UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-2494

MICHAEL L. BERNBACK,
PLAINTIFF-APPELLANT,
v.
THOMAS GRECO, INDIVIDUALLY AND AS PRESIDENT OF HARVEY'S LAKE AMPHITHEATER, INC.,
DEFENDANT-APPELLEE.

Submitted: March 7, 2005
Opinion Filed: March 30, 2005

Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. Civ. No. 98-00230). Honorable A. Richard Caputo, District Judge.

Before SCIRICA, Chief Judge, and ROTH and GREENBERG, Circuit Judges.

**OPINION**

GREENBERG, Circuit Judge.

This matter comes on before this court on an appeal from an order entered April 29, 2004, in accordance with a memorandum opinion of the district court of that day. Inasmuch as we are writing only for the parties who, of course, are familiar with this case, we need not set forth its facts or procedural history. The issue in this case is quite simple and is stated fairly by Michael L. Bernback, the appellant: whether interest on an award of attorneys fees and

expenses accrues from the date of the original judgment on a jury verdict entitling a party to attorneys fee and expenses, in this case November 6, 2000, or, as the appellee Thomas Greco argues, from the time when a judgment was entered on the award of attorneys fees and expenses after they were quantified, in this case, July 29, 2002. The district court selected the later date and Bernback has appealed.

The district court exercised diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and we exercise jurisdiction under 28 U.S.C. § 1291. We exercise plenary review as the question is purely of law. *Tudor Dev. Group, Inc. v. United States Fid. & Guar. Co.*, 968 F.2d 357, 359 (3d Cir. 1992).

We will affirm as our result is controlled by our opinion in *Eaves v. County of Cape May*, 239 F.3d 527, 542 (3d Cir. 2001). Bernback's brief, which argues for interest from the earlier date and cites precedent from other courts of appeal in support of this contention, necessarily is of no avail as it is dependent on his assertion that we "wrongly followed the so-called minority view," appellant's br. at 17, in reaching our result in *Eaves*. Of course, we as a panel must reject Bernback's contention as *Eaves* binds us. Third Circuit IOP 9.1.

The order of April 29, 2004, will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL L. BERNBACK, Plaintiff, | : | |
| VS. | : | CIVIL ACTION NO. 3:98-CV-0230 |
| THOMAS GRECO, Individually and as President of Harvey's Lake Amphitheater, Inc., Defendant. | : | (JUDGE CAPUTO) |

MEMORANDUM

This matter presents the interesting question as to whether the prevailing party who has been awarded legal fees is limited to interest on the awarded fees or whether the prevailing party may recover additional attorney fees on the interest accrued and paid on the judgment itself. The issue is presented because in awarding attorney fees in the first instance, I found any fees were capped to the Plaintiff's agreement with his lawyer. The documents authorizing fees to the Plaintiff spoke of collecting from Defendant the actual fees incurred by the Plaintiff. At the same time, Plaintiff's fee agreement with his counsel limited his fees to 40%. The relevant provisions are as follows:

> 2. I (we) agree to pay Angina & Rovner, P.C. any out-of-pocket expenses they incur to secure records, expert etc., plus a contingent fee that is totally dependant upon their obtaining monies for me (us) as follows . . .
>
> (c) Settlement or verdict at trial, or arbitration, after trial, arbitration, or

appeals or shortly before trial, and after this case has been totally prepared – 40%

(d) **If no-fault recovery or non-monetary benefit** – RCA ($500); NJR ($450); others ($400) per hour but **not to exceed 40% of the total recovery** of value of benefit.

(Power of Attorney and Fee Agreement, Doc. 270, Ex. A at ¶ 2(c)(d)) (emphasis added).

By his Motion for Interest, Attorney's Fees and Expenses (Doc. 302), Plaintiff seeks to recover 40% of the interest which was paid on the judgment. In addition, Plaintiff seeks interest on the attorney's fees already awarded, and he seeks the interest from the day I determined the fees were due, not from the day they were quantified.

The interest on the attorney's fees already awarded in the amount of $90,000 began to run on July 29, 2002, the day judgment was entered on the amount of fees. This is governed by *Eaves v. County of Cape May*, 239 F.3d 527 (3d Cir. 2001) where the court held that post judgment interest on an attorney's fee award runs from the date the award is quantified, viz the date there is a "money judgment" under 28 U.S.C. § 1961(a). *Id.* at 527. Therefore, interest on the award of counsel fees and of course the expenses awarded ($162,748.62) begins to run July 29, 2002, the date the judgment for the amount of the fees was entered. The amount of interest owed is therefore $54,935.78.

As noted, Plaintiff also seeks additional fees for services rendered in connection with a post trial appeal to the United States Court of Appeals for the Third Circuit, opposing a petition for a writ of certiorari to the United States Supreme Court, and various other matters requiring the performance of legal services.

In deciding the entitlement and amount of fees on the Plaintiff's original petition for fees and expenses, I did a lodestar analysis, and determined the amount yielded in the lodestar analysis was limited by the agreement which Plaintiff had with his counsel, since the documents providing for fees and costs to the prevailing party authorized "actual attorney's fees incurred, court costs, and other litigation related expenses." (See Memorandum of May 20, 2002 at p. 6.) The fee agreement between the Plaintiff and counsel provided for a contingent fee of 40% in the event of "settlement or verdict at trial . . . or appeals . . . and after the case had been totally prepared." (*Id.* at p. 15.)

Now I am confronted with the Plaintiff's claim for additional fees performed for proceedings post judgment, viz appeal to the United States Court of Appeals for the Third Circuit and petitions for writ of certiorari to the United States Supreme Court. This represents a period of November 9, 2002 to the present. Plaintiffs have not yet provided the number of hours of services provided during this period.

Plaintiff should submit evidence of those services, and I will undertake to determine the amount of fees to which Plaintiff is entitled. After I do a lodestar analysis respecting the additional legal services, I will determine the amount of fees due taking into account the fee agreement.

Therefore, Plaintiff will submit his evidence of fees and expenses for the period since November 20, 2002, together with a brief, within thirty (30) days and the Defendant shall have thirty (30) days to file opposing evidence and a brief.

An appropriate order follows.

Date : April 24, 2004

_____

A. Richard Caputo
United States District Judge

Supreme Court, U.S.
FILED
SEP 3 1 2005
OFFICE OF THE CLERK

No. 05-19

In The

# Supreme Court of the United States

MICHAEL L. BERNBACK,

*Petitioner,*

v.

THOMAS GRECO, Individually and as President of Harvey's Lake Amphitheater, Inc.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. COSGROVE
*Counsel of Record*
1460 Wyoming Avenue
Forty Fort, PA 18704
(570) 287-0921

*Attorney for Respondent*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether the Court should decline to review an unpublished decision of the U.S. Court of Appeals for the Third Circuit affirming the district court's determination of the date from which interest on a judgment for attorney's fees accrues under 28 U.S.C. 1961(a), when, unlike cases from other circuits interpreting sec. 1961(a), the district court's assessment of attorney's fees in this case was based upon private contracts between the parties as well as a complicated fee agreement between petitioner and counsel, and was not otherwise specifically provided for by statute or other provision of law.

## CORPORATE DISCLOSURE STATEMENT

Respondent, Thomas Greco, was the sole shareholder of Harvey's Lake Amphitheater, Inc. Through the Stock Purchase Agreement at issue in this case, petitioner acquired "a 50% interest in Harvey's Lake Amphitheater, subject to certain conditions." *Bernback v. Greco*, No. 02-2742, 69 Fed.Appx. 98, 101 (CA3 July 11, 2003). Respondent appears in this matter individually, and as President of Harvey's Lake Amphitheater, Inc.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| CORPORATE DISCLOSURE STATEMENT | ii |
| COUNTER-STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 3 |
| A. Since the attorney's fees awarded in this case were based on the district court's interpretation of complicated private contracts and not on statutory or other provisions of law (as in the cases cited by petitioner as representing a "recurring circuit conflict"), the factual complexity of this case makes it an inappropriate vehicle for consideration of the question presented by petitioner | 3 |
| CONCLUSION | 7 |

## TABLE OF AUTHORITIES

Page

CASES:

*Associated General Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482 (CA6 2001) ..... 4

*BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (CA11 1994) ..... 4

*Bernback v. Greco*, No. 02-2742, 69 Fed.Appx. 98 (CA3 July 11, 2003), *cert. denied*, 540 U.S. 1185 (2004) ..... 1, 2

*Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (CA5 1983) ..... 4, 5

*Eaves v. County of Cape May*, 239 F.3d 527 (CA3 2001) ..... 2, 4, 6

*Fleming v. County of Kane*, 898 F.2d 553 (CA7 1990) ..... 4

*Friend v. Kolodzieczak*, 72 F.3d 1386 (CA9 1995), *cert. denied*, 516 U.S. 1146 (1996) ..... 4

*Jenkins v. Missouri*, 931 F.2d 1273 (CA8 1991) ..... 4

*Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) ..... 3

*King v. JCS Enterprises, Inc.*, 325 F.Supp.2d 162 (E.D.N.Y. 2004) ..... 5

*Mathis v. Spears*, 857 F.2d 749 (CAFC 1988) ..... 4

*MidAmerica Federal Savings & Loan Association v. Shearson/American Express, Inc.*, 962 F.2d 1470 (CA10 1992) ..... 4, 5

*U.S. v. Metropolitan Dist. Com'n*, 847 F.2d 12 (CA1 1988) ..... 6

## TABLE OF AUTHORITIES – Continued

Page

STATUTES:

15 U.S.C. 1 ..... 5

15 U.S.C. 15 ..... 1, 5

28 U.S.C. 1961(a) ..... 2, 3, 4, 5

35 U.S.C. 285 ..... 4

42 U.S.C. 1983 ..... 4

42 U.S.C. 1988 ..... 4

71 Okla. Stat. 408 ..... 5

RULES AND REGULATIONS:

Fed.R.Civ.P. 15 ..... 1

Fed.R.Civ.P. 37 ..... 4

## COUNTER-STATEMENT OF THE CASE

The underlying facts of this case reflect a complicated business relationship between petitioner and respondent manifested in several agreements between them individually as well as through the entity known as Harvey's Lake Amphitheater, Inc ("HLAI"). Although HLAI was formed in 1992 to construct an outdoor concert arena near the popular Pocono Mountain recreation area of Pennsylvania, the relationship between petitioner and respondent had so deteriorated by 1996 that a series of legal struggles soon commenced. *Bernback v. Greco*, No. 02-2742, 69 Fed.Appx. 98, 101 (CA3 July 11, 2003). The pending petition is merely the most recent salvo in this long and combative process. In fact, this is not the first time this Court has reviewed a petition for writ of certiorari regarding these parties. In 2004, certiorari was denied on respondent's petition seeking review of the Third Circuit's affirmation of the district court's permission to amend petitioner's complaint in the midst of trial, despite the admonitions of Rule 15, Fed.R.Civ.P. *Bernback*, *supra*, *cert. denied*, 540 U.S. 1185 (2004).

Now, it is petitioner who is unhappy with a lower court's determination of an issue important to him, namely, the question of whether interest accrues on an award of attorney's fees from the date of the initial judgment on the merits (which, in this case did *not* include an award of fees), or as the Third Circuit held below, from the "time when a judgment was entered on the award of attorney's fees and expenses after they were quantified . . . " Pet. App. 2a.

The peculiar factual history of this matter is essential to consideration of the question at hand: On November 6,

2000, after the jury's verdict, the district court entered judgment in petitioner's favor, without specific reference to attorney's fees. There was also no indication that attorney's fees were allowable under any particular statutory or other legal provision. Instead, petitioner filed a post-verdict motion for fees and expenses, alleging that two alleged contracts between him and respondent "contained fee shifting provisions that allowed for an award of attorneys' fees . . . " *Bernback*, 69 Fed.Appx. at 105. The district court reviewed these contracts (a Stock Purchase Agreement as well as a Personal Guarantee, *id.*) and concluded that although each contract contained provisions for award of attorney's fees, petitioner had also entered into a separate fee agreement with his counsel which "limited [counsel's] fees to 40%." Pet. App. 3a. For this reason, the district court "conform[ed] the fee award to the fee agreement between [petitioner] and his counsel." *Bernback*, *supra*. The first judgment, therefore, to address attorney's fees was entered on July 29, 2002, after the district court construed the role of these three private agreements in the calculation of those fees. Pet. App. 3a.

When respondent later sought interest on the awarded fees, the district court construed the plain language of 28 U.S.C. 1961(a) (hereinafter sec. 1961), as well as the Third Circuit's decision in *Eaves v. County of Cape May*, 239 F.3d 527 (CA3 2001) and held that interest would be calculated from July 29, 2002, "the day judgment was entered on the amount of fees." Pet. App. 4a. When the Third Circuit affirmed, *id.* at 1a, petitioner sought this Court's review.

## REASONS FOR DENYING THE WRIT

### A. Since the attorney's fees awarded in this case were based on the district court's interpretation of complicated private contracts and not on statutory or other provisions of law (as in the cases cited by petitioner as representing a "recurring circuit conflict"), the factual complexity of this case makes it an inappropriate vehicle for consideration of the question presented by petitioner.

The attorney's fees at issue in this case were calculated by the district court based upon its interpretation of three separate, complicated and even conflicting agreements between private parties, and were not premised on any statutory or rule-based provisions. The district court found that petitioner and respondent were parties to two of these private agreements (a finding which respondent continues to vigorously oppose), namely the Stock Purchase Agreement and the Personal Guarantee which form the basis for much of the nearly decade long litigation between them. The third contract was a fee agreement between respondent and his counsel, which was based upon a complex calculus of both hourly rates and percentage of recovery. Pet. App. 3a-4a. Without this stew of private contractual provisions, the award of attorney's fees would not have been at issue in this case.

After extraction of the various fee-based clauses of these three documents, and its interpretation of their relevance to one another, the district court constructed its fee assessment and entered judgment awarding the quantified fee on July 29, 2002. Under the plain statutory language of sec. 1961, any interest on this award could only be calculated from this date. *See, Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)

("[T]he starting point for interpretation of [sec. 1961] . . . is the language of the statute itself."). It is this calculation, however, which petitioner seeks to overturn.

Petitioner takes great pains to urge this Court's review of what it perceives to be a "frequently recurring circuit conflict" on the question of when the calculation of interest on a sec. 1961 award begins to run, specifically with regard to attorney's fees. Petition at 2-3. Supporting this contention is a list of decisions from the several courts of appeals addressing the calculation date for interest on such fees. *See, e.g., Associated General Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 484-85 (CA6 2001); *Eaves, supra*; *MidAmerica Federal Savings & Loan Association v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (CA10 1992); *Fleming v. County of Kane*, 898 F.2d 553, 565 (CA7 1990); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995), *cert. denied*, 516 U.S. 1146 (1996); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1052-53 (CA11 1994); *Jenkins v. Missouri*, 931 F.2d 1273, 1277 (CA8 1991); *Mathis v. Spears*, 857 F.2d 749, 760 (CAFC 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 544-45 (CA5 1983). The underlying facts of these cases, however, are vastly different from those in the present case. In fact, in each of the cases cited by petitioner, the award in question was based either on statute or rule which was evident at the time of entry of the award on the merits.

For example, *Drabik*, *Eaves*, *Fleming*, *Friend* and *Jenkins* were civil rights cases under 42 U.S.C. 1983, with the question of attorney's fees governed by 42 U.S.C. 1988. In *BankAtlantic*, the court imposed discovery violation sanctions pursuant to Rule 37, Fed.R.Civ.P. *Mathis* was a patent case, with the fee question arising under 35 U.S.C.

285. *Copper Liquor* involved the Sherman Act, 15 U.S.C. 1, with fees claimed under the Clayton Act, 15 U.S.C. 15. On the other hand, the fee issue in *MidAmerica* arose out of a pendent state claim under the Oklahoma Securities Act. 71 Okla.Stat. 408.

Whatever their decision on the sec. 1961 question, these cases represent the prevailing view regarding award of attorney's fees, namely, that "[u]nder the 'American Rule,' the prevailing party will not be awarded attorney's fees unless expressly authorized by Congress." *King v. JCS Enterprises, Inc.*, 325 F.Supp.2d 162 (E.D.N.Y. 2004). In each of the cases cited by petitioner, either federal or state statute, or procedural rule governed the award of fees. As such, the existence of these provisions which "expressly authorized" the award of attorney's fees was obvious throughout those proceedings.

Such is not the case, however, in the present matter. There is no ancillary statute or rule which "expressly authorized" the award of fees in this case. Instead, the fees in question were contractually based, and required a separate motion for their award as well as a separate adjudication by the district court.

Given the interpretive gymnastics in which the district court had to engage in order to determine what, if any, fee would be awarded, it is an imaginative stretch to say that at the time of the jury verdict and judgment on the merits, it was clear that petitioner was "'unconditionally entitled' to recover attorney's fees." Petition 7-8, fn. 4. As such, the only "judgment" relevant to a sec. 1961 interest calculation under the peculiar facts of this case was the July 29, 2002 date. By upholding the district court, the Third Circuit merely recognized that "[i]n the

realm of fee awards . . . to a far greater extent than is true of discrete legal issues, the battle is likely to be determined in the trial court . . . " *U.S. v. Metropolitan Dist. Com'n,* 847 F.2d 12 (CA1 1988) (internal citations omitted).[1]

While petitioner suggests that grant of certiorari is necessary in this case in order to resolve this supposed "circuit conflict," he is mistaken. In fact, this case is a most inappropriate vehicle for resolution of the question petitioner presents given the complex factual marsh through which the Court must wade in order to reach that question. Actually, this Court would have to dive into the district court's fact-based assessment of the contracts at issue and the intent of the various parties to those contracts and then determine what impact these factual nuances have on the assessment of sec. 1961 issues in other cases where a clearer underlying entitlement to attorney's fees existed. Such machinations do not readily allow for the kind of clear resolution petitioner seeks, nor do they easily support invocation of certiorari. As such, for these reasons this Court should deny certiorari.

---

[1] Petitioner is in error when he suggests that the Third Circuit only grudgingly affirmed. *See,* Petition at 2, ¶ 3. His claim that the Third Circuit "acknowledged that petitioner's position was supported 'by precedent from other courts of appeals,'" is an overstatement. *Id.* The Third Circuit merely noted that petitioner had *cited* these other cases, but did not give any indication that it agreed with petitioner as to their value. Instead, the panel restated its allegiance to the precedent from this Circuit outlined in *Eaves.*